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war."²⁰ A statute permitting suspension of any provision of the labor law which "will obstruct, hamper or interfere with the successful prosecution of the present war, or be opposed to public welfare and necessity," has passed the legislature and is awaiting gubernatorial action in New York;²¹ while Pennsylvania has a similar bill pending at present writing.²² It is almost unnecessary to point to the grave danger lurking in such statutes, vesting, as they do, unprecedented and unbridled power in the hands of legislative commissions,²³ and imperilling at one blow the whole structure of social welfare legislation, erected to protect alike present and coming generation of Americans. There is English precedent²⁴ for these dangerous measures; but our emergency is not yet grave enough to justify dispensing with safeguards so essential to the normal happiness of our people and the future welfare of the race.

FEDERAL EMERGENCY WAR LEGISLATION.—The entrance of the United States into the world war has inevitably given rise to a situation which the legislation of peace times is totally inadequate to meet and which, therefore, demands the enactment of special, temporary measures capable of coping with the emergency. Aside from the general provision of the Federal Penal Code defining treason¹ and seditious conspiracy,² there were few laws existing at the outbreak of the present war which were aimed at offenses against the national defense. By federal statutes, spying in the army or navy has long been punishable by death.³ Furthermore, it is a crime, punishable by fine or imprisonment or both to injure military or naval works⁴ or to commit arson on magazines, ships or ammunition belonging to the United States⁵ or to make a sketch of any fort or naval vessel without authority.⁶ In the

²⁰Pub. Acts Vt. 1917, No. 172.

²¹Legislature of New York, Session of 1917, Senate, Pr. No. 2149.

²²Legislature of Pennsylvania, Session of 1917, File of House of Representatives, No. 1637.

²³The power vested in the commission to suspend labor laws "opposed to public welfare and necessity" and to make "rules and regulations prescribing conditions under which employment will be permitted" in certain industries, seems a delegation of legislative functions to that body without setting a sufficiently definite standard for their exercise. That there must be a standard, and that the New York courts have refused to go further than to permit a legislative commission to decide what are "reasonable" regulations, see *Village of Saratoga Springs v. Saratoga Gas, etc. Co.* (1908) 191 N. Y. 123, 83 N. E. 693; *People v. Klinck Packing Co.* (1915) 214 N. Y. 121, 139, 108 N. E. 278, 284.

²⁴See, *e. g.*, *Defence of the Realm Consolidated Regulations 1914*, as amended to Nov. 29, 1916, Regulation 6 A. For a recent review of British war emergency legislation, see 30 *Harvard Law Rev.* 663.

¹(1909) 35 Stat. 1088; 10 U. S. Comp. Stat. (1916) §§ 10,165-10,167.

²(1909) 35 Stat. 1089; 10 U. S. Comp. Stat. (1916) § 10,170.

³(1806) 2 Stat. 371; 1 U. S. Comp. Stat. (1913) § 2,448; (1862) 12 Stat. 340; 4 U. S. Comp. Stat. (1916) § 2,966.

⁴(1909) 35 Stat. 1097; 10 U. S. Comp. Stat. (1916) § 10,208.

⁵(1909) 35 Stat. 1144; 10 U. S. Comp. Stat. (1916) § 10,459.

⁶(1909) 36 Stat. 1084; 10 U. S. Comp. Stat. §§ 10,209-10,210. An additional penalty is prescribed for attempting to communicate such matter to a foreign government. (1911) 36 Stat. 1085; 10 U. S. Comp. Stat. (1916) §§ 10,211-10,212.

states, there was practically no legislation other than the usual provision making it a crime to injure a public building.⁷

Any emergency legislation that this country may adopt must, in a general way, follow the English legislation enacted after the outbreak of the war in 1914, for the same problem confronts us as confronted the English, namely, of harmonizing the necessity resting upon Government to make the utmost possible provision against the exigencies resulting from a state of war with the natural zeal on the part of the people to preserve intact fundamental constitutional guaranties. By the Defense of the Realm Acts⁸ the Privy Council was given broad powers to make such regulations as it deemed proper for the common safety and defense, including the power to prohibit the dissemination of alarming reports, even if true. In case of emergency, trials under this act might be had in secret.⁹ By the Trading with the Enemy Act and its amendments,¹⁰ any commerce with an enemy firm or even a neutral firm with enemy connections was made a punishable offense.¹¹ Legislation was enacted legalizing the seizure of foodstuffs when unreasonably withheld from the market.¹² And, finally, a law was passed prohibiting strikes and lockouts in and limiting the profits of munition plants during the duration of the war.¹³

It is only when viewed in the light of these English statutes that the so-called Espionage Bill¹⁴ can be properly understood. The bill passed by the House of Representatives, among other things, renews the provisions against procuring information concerning the national defense without authority,¹⁵ and punishes by fine or imprisonment or both the destruction of commodities with intent to prevent their export,¹⁶ making a false statement under oath with intent to influence the United States or a foreign government in any controversy existing

⁷Conn. Gen. Stat. (1902) § 1169; Fla. Comp. Laws (1914) § 3429; Ga. Park's Penal Code (1914) § 777; Iowa Code (1897) § 4802; Kan. Gen. Stat. (1915) § 3709; Ky. Stat. (1915) §§ 1258, 1262, 3951; Mass. Rev. Laws (1902) c. 208, §§ 80, 81; Miss. Code (1906) § 1065; Mont. Rev. Codes (1907) § 8772; New Mex. Stat. (1915) § 1573; N. C. Revisal of 1908, § 3344; N. D. Comp. Laws (1913) § 9846; Okla. Rev. Laws (1910) § 2589; Pa. 3 Purdin's Digest, p. 3695; R. I. Gen. Laws (1909) p. 1255; 2 S. D. Comp. Laws (1913), Penal Code § 535; White's Tex. Penal Code Art. 499, p. 596; Va. Code (1904) § 3731; Wis. Stat. (1915) § 4442. Connecticut has a law making it a crime to destroy a powder magazine, or military or naval stores, Conn. Gen. Stat. (1902) § 1167, and in Maryland there is a penal statute aimed at the destruction of privately owned bridges, railways etc. with intent to start an insurrection. Md. Ann. Code (1914) Art. 27, §§ 468, 471.

⁸(1914) 4 & 5 Geo. V, c. 29; (1914) 4 & 5 Geo. V, c. 63, consolidated in the Defense of the Realm Consolidation Act (1914) 5 Geo. V, c. 8.

⁹Defense of the Realm Amendment Act (1915) 5 Geo. V, c. 34.

¹⁰(1914) 4 & 5 Geo. V, c. 87; (1915) 5 & 6 Geo. V, c. 98.

¹¹An interesting and startling feature of the original Trading with the Enemy Act was its retroactive effect. See § 1.

¹²(1914) 4 & 5 Geo. V, c. 51.

¹³(1915) 5 & 6 Geo. V, c. 54. The result of this Act was practically to place all munition plants under government control.

¹⁴65th Congress, First Session, H. R. No. 291, as passed by the House of Representatives May 4, 1917.

¹⁵Title I, §§ 1, 2. See note 6, *supra*.

¹⁶Title IV, § 400.

between them,¹⁷ acting as an agent of a foreign government without recognition by the United States,¹⁸ or conspiring to injure public property in a nation with which the United States is at peace.¹⁹

The much-discussed censorship section has undergone many changes in the course of its legislative history. As originally framed and as passed by the Senate in February, 1917²⁰ it prohibited under penalty of fine, imprisonment or both the collection or publication, in violation of regulations to be prescribed by the President, of any information concerning the national defense which, in the judgment of the President, might be useful to the enemy. This bill was not acted upon by the House of Representatives in the 64th Congress. When reintroduced in the 65th Congress, the section was amended by the addition of a proviso that nothing contained therein should be construed to limit the publication of criticism or comment on the policy of the government or its representatives.²¹ The bill was further amended before it passed the House of Representatives to provide that no conviction might be had under it unless the jury found as a fact that the information published was or might be useful to the enemy.²²

This restriction on the power of the press is, as far as the United States is concerned, unique. All previous inhibitions have been exercised under the police power. Thus, many states have passed laws against the publication or circulation of obscene or scandalous matter,²³ or false advertisements²⁴ or information concerning lotteries,²⁵

¹⁷Title VII, § 700.

¹⁸Title VII, § 702.

¹⁹Title VII, § 704.

²⁰64th Congress, 2nd Sess. Senate Bill No. 8148 § 2c.

²¹65th Congress, 1st Sess. H. R. No. 291, Title I, § 4. In the Senate bill this provision was subject to the limitations that the criticism contained no information which might be useful to the enemy. 65th Congress, 1st Sess. Senate Bill No. 2, chapter II, § 2a.

²²65th Congress, 1st Sess. H. R. No. 291, Title I, § 4, as passed by the House of Representatives May 4, 1917. This is the so-called Gard Amendment. The entire section, as passed by the House of Representatives, was rejected by the Senate on May 14, 1917.

²³Ala. Gen. Acts (1909) p. 230; Conn. Gen. Stat. (1902) § 1326; Ill. Stat. Ann. (1913) § 3771; Iowa Code (1897) § 4952; Kan. Gen. Stat. (1915) §§ 3676-3678; Ky. Stat. (1915) § 1353; 3 Md. Ann. Code (1914) Art. 27, § 371; Mass. Rev. Laws (1902) c. 212, §§ 16, 21; Mass. Rev. Laws (1908 Supp.) p. 1442; Mich. Howell's Stat. § 14,808; Id. § 5,299; Minn. Gen. Stat. (1913) §§ 8707, 8709; Mo. Rev. Stat. (1909) § 4730; Mont. Rev. Code (1907) § 8401; Neb. Rev. Stat. (1913) §§ 8606, 8789; N. J. Acts of 1911, c. 85; Ohio Page & Adams' Gen. Code §§ 3663, 13,034; P. I. Penal Code, p. 169.

²⁴Ala. Gen. Laws (1915) p. 339; Colo. Laws of 1915, c. 67; Conn. Public Acts of 1913, c. 65; Iowa Code (1913 Supp.) § 5051-a; Kan. Gen. Stat. (1915) § 3687; Ky. Acts of 1916, c. 97; Md. Ann. Code (1914) Art. 27, §§ 159-160; Mass. Laws (1908 Supp.) p. 1431; Mich. Public Acts (1913) No. 276; Neb. Rev. Stat. (1913) § 8896; Wash. Laws of 1913, c. 34. For a general treatment of this legislation see 17 Columbia Law Rev. 258. By (1912) 37 Stat. 554; 7 U. S. Comp. Stat. (1916) § 7314, all paid newspaper advertisements must be marked with the word "advertisement".

²⁵Ga. Park's Penal Code (1914) §§ 401, 402; Kan. Gen. Stat. (1915) § 3676; Ky. Stat. (1915) § 1314; Me. Rev. Stat. (1916) c. 130, § 18; Md. 3 Ann. Code (1914) Art. 27, § 309; Miss. Code (1906) §§ 1281, 1282; N. C. Revisal of 1908, § 3725; Ohio Page & Adams' Gen. Code. (1912) § 13067. Information concerning a lottery is made unlawful by (1909) 35 Stat. 1129; 10 U. S. Comp. Stat. (1916) § 10383.

and at least three states have made it a crime to publish the name or identity of a raped female.²⁶ That liberty and freedom of speech do not mean the unrestricted right to say and do what one pleases at all times and under all circumstances²⁷ is proved by the uniformity with which the courts have sustained this and similar legislation.²⁸ However, on the advisability of enacting the censorship provision of the pending bill, there may well be a reasonable difference of opinion. There is an irreconcilable conflict between the secrecy required for the proper execution of military plans and the publicity demanded by newspapers and their readers. However this may be, the clause providing that no conviction can be had unless the jury, as judges of fact, find that the published matter actually "was of such character as to be useful to the enemy" and the provision exempting the publisher of fair comment on the acts of public officials from criminal liability, seem to insure that the section, as at present framed,²⁹ in view of the attitude of the courts on this question,³⁰ would be sustained as constitutional.

²⁶Fla. Comp. Laws (1914) § 3222a; Ga. Park's Penal Code (1914) § 343; 2 S. C. Code of Laws (1912) Crim. Code 2, § 317.

²⁷Warren v. United States (8 C. C. A. 1910) 183 Fed. 718, 721.

²⁸In re Rapier (1891) 143 U. S. 110, 12 Sup. Ct. 374; Harman v. United States (C. C. 1892) 50 Fed. 921; People v. Most (1902) 171 N. Y. 423, 64 N. E. 175; State v. Fox (1912) 71 Wash. 185, 127 Pac. 1111; Tyomies Pub. Co. v. United States (6 C. C. A. 1914) 211 Fed. 385; Warren v. United States, *supra*; cf. United States *ex rel.* Turner v. Williams (1904) 194 U. S. 279, 24 Sup. Ct. 719, and Mutual Film Corp. v. Industrial Comm. of Ohio (1915) 236 U. S. 230, 35 Sup. Ct. 387, the latter sustaining the constitutionality of the motion picture censorship.

²⁹See note 15, *supra*.

³⁰See note 27, *supra*.